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In the
Supreme Court of the United States

COLLEGE STANDARD MAGAZINE, JEFFREY SCOTT BAREA, and JULIEN A.M. STARR,
Petitioners,

v.

STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK AT ALBANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Second Circuit erred in holding, in harmony with the Sixth Circuit but in conflict with decisions of the Third, Fourth, Fifth, Eighth, and Ninth Circuits, that a request for or award of nominal damages does not prevent a case from becoming moot?

RULE 29.6 STATEMENT

Petitioners Jeffrey Scott Barea and Julien A.M. Barr are individuals.

Petitioner College Standard Magazine is an unincorporated association.

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND POLICY 2

PRELIMINARY STATEMENT 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

I. THE COURTS OF APPEALS HAVE BECOME DEEPLY DIVIDED OVER WHETHER THE AVAILABILITY OF NOMINAL DAMAGES PREVENTS A CASE FROM BECOMING MOOT WHEN DURING THE LITIGATION THE GOVERNMENT REPEALS OR REPLACES THE CHALLENGED POLICY AND THIS DIVISION HAS IMPORTANT CONSEQUENCES TO CIVIL RIGHTS PLAINTIFFS AND GOVERNMENT DEFENDANTS. 7

A. The majority of the Courts of Appeals have held in essence that the repeal or replacement of an unconstitutional law does not erase the slate and the award of nominal damages holds defendants

responsible for their past unlawful action — two Circuits, the Sixth and now the Second have departed from this growing consensus 9

B. Until the issue is resolved, parties (in circuits that have wrongly decided the issue) are being forced unjustly to bear risks and costs of litigation that they should not. 12

C. The minority side of the circuit split has a particularly pernicious effect upon free speech cases like this one where the government possesses unbridled discretion to determine access to a forum. ... 15

D. In the decade since this Court's decision in *Buckhannon* the question whether nominal damages prevent a case from becoming moot, where the government has changed or repealed an alleged unconstitutional policy, has come strikingly to the fore 16

CONCLUSION 18

APPENDIX

Opinion of the U.S. Court of Appeals for the Second Circuit (July 1, 2010) 1a

Decision of the U.S. District Court for the Northern District of New York (August 8, 2005) (Excerpt of Transcript Proceedings containing decision.) 9a

Amended Decision of the U.S. District Court for the Northern District of New York (February 6, 2007) 14a

Decision of the U.S. District Court for the Northern District of New York (October 18, 2006) 16a

Order denying Appellee's Petition for Rehearing *en banc* of the U.S. Court of Appeals for the Second Circuit (September 20, 2010) 18a

TABLE OF AUTHORITIES

CASES:

Advantage Media, LLC v. City of Eden Prairie,
456 F.3d 793 (8th Cir.2006).....6, 11

Bernhardt v. County of Los Angeles,
279 F.3d 862 (9th Cir. 2002) 10

Beta Upsilon Chi Upsilon Chapter at the University of Florida v. Machen,
586 F.3d 908 (11th Cir. 2009).....14

Board of Regents of University of Wisconsin System v. Southworth,
529 U.S. 217 (2000).....3

Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources,
532 U.S. 598 (2001).....16-18

Burns v. PA Dept. of Correction,
544 F.3d 279 (3rd Cir. 2008) 6, 11, 18

Carey v. Piphus,
435 U.S. 247 (1978).....7-8, 13

City of Lakewood v. Plain Dealer Publishing Co.,
486 U.S. 750 (1988).....15

College Standard Magazine v. Student Association of the State of University of New York at Albany,
610 F.3d 33 (2nd Cir. 2010).....1, 18

Covenant Media of SC, LLC v. City of North Charleston,
493 F.3d 421 (4th Cir. 2007).....6, 11, 18

Forsyth County, Ga. v. Nationalist Movement,
505 U.S. 123 (1992).....15

Freedom From Religion Foundation, Inc. v. City of Green Bay,
581 F.Supp.2d 1019 (E.D. Wis. 2008) ...6, 8, 11-12

Jacobs v. Clark County School District,
526 F.3d 419 (9th Cir. 2008).....6, 10

Memphis Community School Dist. v. Stachura,
477 U.S. 299 (1986).....8, 13

Morgan v. Plano Independent School Dist.,
589 F.3d 740 (5th Cir. 2009).....6, 9, 18

Morrison v. Board of Educ. of Boyd County,
521 F.3d 602 (6th Cir. 2008) 6, 11-12

Thomas v. Chicago Park Dist.,
534 U.S. 316 (2002).....15

Utah Animal Rights Coalition v. Salt Lake City Corp.,
371 F.3d 1248 (10th Cir. 2004).....6, 8, 10-12, 18

INTRODUCTION

Petitioners brought an action challenging the Student Association of the State University of New York at Albany's ("SA") viewpoint discriminatory allocation of student activity funding to student organizations. During the litigation in the district court, the SA changed its policy. Nevertheless, the district court granted summary judgment to petitioners on their facial challenge to the old policy and awarded them each nominal damages. In light of the changed policy, the Second Circuit vacated the judgment of the district court as moot despite petitioners' obtaining of nominal damages. The Second Circuit's decision conflicts with the majority of the other Courts of Appeals that have decided the issue of whether the award of nominal damages prevents a case from becoming moot when the government repeals or replaces the challenged law.

OPINIONS BELOW

The Second Circuit's opinion is reported as *College Standard Magazine v. Student Association of the State University of New York at Albany*, 610 F.3d 33 (2nd Cir. 2010) and appears in Appendix ("A.") at 1a – 8a. The opinion of the United States District Court for the Northern District of New York (McAvoy, J.) is unreported and a transcript of the Court's oral decision appears at Appendix ("A.") at 9a – 13a.

STATEMENT OF JURISDICTION

The petitioners seek review of the decision of the Second Circuit Court of Appeals rendered on July 1, 2010. A. at 1a. The Second Circuit denied petitioners' timely petition for rehearing and rehearing en banc on September 20, 2010. A. at 18a-19a. The mandate issued on September 25, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND POLICY

The United States Constitution Art. III, Sec. 2 provides in pertinent part: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority ... ."

PRELIMINARY STATEMENT

Scott Barea, Julien Starr, and College Standard Magazine won their case in the district court and were awarded nominal damages. A. at 13a. On cross-motions for summary judgment, the district court found that defendant required petitioners to give their money to the Student Association ("SA"), which then distributed it to other groups in a facially unconstitutional manner. A. at 9a-13a. In particular, the district court found that the SA's policy allowed it to deny a student group funding for any reason including reasons having to do with the popularity of the group with other students. A. at 11a. The SA appealed the district court's

determination that their policy had violated the First Amendment. *Cf.* A. at 5a.

On appeal, the Second Circuit vacated the judgment as moot. The circuit court found that the SA had changed its policy (before the decision on summary judgment), found that the SA was unlikely to return to the old policy, and decided that the award of nominal damages for past wrongs was insufficient to avoid mootness. A. at 5a-6a. The decision fractured the Second Circuit from the majority of the other circuits that have considered this issue. Whether an award of nominal damages prevents a case from becoming moot is an issue that has caused division and confusion in the lower courts in a variety of different contexts. Therefore, petitioners respectfully request that the Court grant the petition.

STATEMENT OF THE CASE

The SA forced Scott Barea, Julien Starr, and College Standard Magazine to give their money to create a public forum for student speech. A. at 2a. Such a system is constitutional provided that the SA distributes the money in a viewpoint neutral manner. *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217, 233 (2000). In this case, the SA did not. The district found that the SA could deny a student group funding for any reason including reasons having to do with the popularity of the group with other students. A. at 10a-12a.

Barea, Starr, and about two dozen other students formed a newspaper called College Standard

Magazine. A. at 2a. College Standard applied for funding, the SA denied this request despite the invocation of *Southworth* and a threat of legal action by plaintiffs.[1] The students and College Standard then sued the SA. Prior to summary judgment, the SA established a new written policy. A. at 3a.

Both parties moved for summary judgment. A. at 2a. The trial court held that the policy was unconstitutional on its face. A. at 10a-13a. The court began by noting that the SA lacked "adequate standards to avoid the problem of unbridled discretion ... [because] defendants believed they could ... deny funding for any reason at all." A. at 10a. The judge explained that "[t]he existence of unabridged discretion presents the risk that the decision maker – here, the student association – will use its broad discretion to favor or disfavor speech based on its content." A. at 10a-11a.

Next, the trial court found that the SA's funding guidelines were not viewpoint neutral. "To the extent that [the SA] did have standards, they admitted to using criteria such as the number of active members in the recognized student organization, whether the recognized student organization was active on campus, and how accessible the student organization was to students ... . Several of these written factors, however, can be related to speech or viewpoint." A. at 11a.

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[1]The SA, according to its own sworn testimony, denied College Standard funding because it was "offensive", "obnoxious", "National Enquirer like", "conservative", "arrogant", "combative", "twisted", "aggressive", and "not an organization that everybody thinks should get the money."

Accordingly, the district court held that "the largely unbridled discretion afforded the student association, coupled with the improper factors it used in its unwritten policy" violated College Standard's and plaintiff-students' First Amendment rights. A. at 11a-12a.

The district found questions of facts on the SA's motive in the as applied challenge and therefore denied both parties' motions for summary judgment on that claim. After summary judgment was granted on the facial challenge, all of the plaintiffs accepted damages of one dollar each on the facial challenge and agreed to the dismissal of the as applied challenge. *See* A. at 3a (noting that the SA's policy was unconstitutional on its face and that "the plaintiffs are entitled to an award of nominal damages in the amount of one dollar"); A. at 15a.

On appeal, the Second Circuit vacated the judgment as moot. A. at 5a. The circuit court reasoned that, since the policy was no longer in effect and plaintiffs had dropped the as applied challenge, an award of nominal damages would have no effect on the parties' legal rights — "we cannot issue a decision that would confer any relief to the plaintiffs and therefore lack jurisdiction." A. at 4a.

REASONS FOR GRANTING THE WRIT

The Court should grant this petition because the Courts of Appeals have become deeply divided over whether the availability of nominal damages prevents a case from becoming moot when during the litigation the government repeals or replaces the challenged policy. The Second Circuit's decision has

deepened this fracture. The Third, Fourth, Fifth, Eighth, Ninth, and Tenth Circuits hold that a claim for nominal damages avoids mootness;[2] by contrast, the Second Circuit in this case adopted the contrary view that the award of nominal damages is insufficient to prevent mootness, a view also embraced in the Sixth Circuit and the Eastern District of Wisconsin.[3]

Only one side of the split can be right — either cases like this one should be dismissed as moot or plaintiffs, like petitioners here, should prevail and be awarded nominal damages together with their fees and costs. Either governments are paying when they should not have to, or plaintiffs are being denied their costs and fees when they deserve to be reimbursed. Until the issue is resolved, parties (in circuits that have wrongly decided the issue) are being forced unjustly to bear risks and costs of litigation that they should not.

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[2] *See Burns v. PA Dept. of Correction*, 544 F.3d 279, 284 (3rd Cir. 2008); *Covenant Media of SC, LLC v. City of North Charleston*, 493 F.3d 421, 429, n. 4 (4th Cir. 2007); *Morgan v. Plano Independent School Dist.*, 589 F.3d 740, 748-49 (5th Cir. 2009); *Advantage Media, LLC v. City of Eden Prairie*, 456 F.3d 793, 803 (8th Cir.2006); *Jacobs v. Clark County School District*, 526 F.3d 419, 426 (9th Cir. 2008); *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1258 (10th Cir. 2004).

[3] *See Morrison v. Board of Educ. of Boyd County*, 521 F.3d 602, 611 (6th Cir. 2008); *Freedom From Religion Foundation, Inc. v. City of Green Bay*, 581 F.Supp.2d 1019, 1031-32 (E.D. Wis. 2008).

Additionally, the minority side of the split has a particularly pernicious effect upon free speech. Circuits, like the Sixth and Second, allow government officials to use the judicial system to gauge the lawfulness of a speech inhibiting policy, and then when the policy is about to become unconstitutional or is declared unconstitutional, the case can be mooted by amending the offending policies at the eleventh hour without incurring any liability for damages or attorney fees. This process can take months or even years. In essence, the minority view allows the government to engage in free censorship during the course of the litigation.

This Court should grant the petition to resolve the divergent application of the mootness doctrine between the Courts of Appeals.

I. The Courts of Appeals have become deeply divided over whether the availability of nominal damages prevents a case from becoming moot when during the litigation the government repeals or replaces the challenged policy and this division has important consequences to civil rights plaintiffs and government defendants.

Nominal damages are appropriate if a plaintiff establishes a violation of a fundamental constitutional right, even if he cannot prove actual injury sufficient to entitle him to compensatory damages. "[C]ourts traditionally have vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). This Court has noted with

approval the award of nominal damages under § 1983 "where deprivations of constitutional rights are not shown to have caused actual injury." *Id.* at 266, n. 24. "By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed ... ." *Id.* at 266. *See also Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 308 n. 11, (1986) (noting that "[n]ominal damages ... are the appropriate means of "vindicating" [First Amendment] rights whose deprivation has not caused actual, provable injury").

The issue presented of course is not whether nominal damages are appropriate in a First Amendment facial challenge where students have been paid required into a mandatory fee system and a group was denied funding, but whether the availability of nominal damages prevents a case from becoming moot when during the litigation the government repeals or replaces the challenged policy. The Court has not expressly addressed this question. *See Utah Animal Rights Coalition*, 371 F.3d at 1266 (noting this Court has not addressed the question of whether "a claim for nominal damages is sufficient to maintain the justiciability of a case that otherwise would be moot"); *Freedom From Religion Foundation, Inc.*, 581 F. Supp. 2d at 1033 ("conclude[ing] that neither the Supreme Court nor the Seventh Circuit has spoken decisively on the issue").

A. The majority of the Courts of Appeals have held in essence that the repeal or replacement of an unconstitutional law does not erase the slate and the award of nominal damages holds defendants responsible for their past unlawful action — two Circuits, the Sixth and now the Second have departed from this growing consensus.

The Circuit Courts are divided over whether the availability of nominal damages prevents a case from becoming moot when the alleged unconstitutional law has been repealed or replaced. Six Courts of Appeals have held that a claim for nominal damages is sufficient to prevent dismissal for mootness. *See supra* n 2. The majority of Courts of Appeals have held in essence that the repeal or replacement of an unconstitutional law does not erase the slate and the award of nominal damages holds defendants responsible for their past illegal actions. Two Circuits, the Sixth and now the Second have departed from this growing consensus. *See supra* n 3.

The majority rule is typified by the Fifth Circuit's decision in *Morgan v. Plano Independent School Dist.*, 589 F.3d 740, 748-49 (5th Cir. 2009). In *Morgan*, plaintiffs brought a facial challenge to a school district's literature distribution policy seeking both declaratory relief and nominal damages. The school changed its policy in the middle of the litigation and the district court dismissed the facial challenge to the policy as moot. The Fifth Circuit reversed, holding that "this court and others have consistently held that a claim for nominal damages avoids mootness." *Id.* at 748.

The Ninth Circuit reached the same conclusion in a similar context in *Jacobs v. Clark County School District*, 526 F.3d 419, 426 (9th Cir. 2008). *Jacobs* dealt with a school dress code which had been repealed during litigation. The court held that "although [plaintiffs] may be entitled to collect *only* nominal damages were they to succeed on their free speech claims, they nonetheless present justiciable challenges to all speech-related aspects of the [defendant's] uniform policy." *Id.* at 426 (emphasis in the original). *See also Bernhardt v. County of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002) (holding that "[a] live claim for nominal damages will prevent dismissal for mootness").

The Tenth Circuit struggled to reach the same conclusion in *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1258 (10th Cir. 2004). In that case, protesters brought an action against city defendants, raising facial challenges to the process for obtaining a permit to demonstrate. While still in the trial court, the City amended the ordinance to cure the alleged defect in the original permitting scheme. The district court dismissed the case as moot. The protesters appealed arguing that a claim for nominal damages prevented their facial claim from being declared moot. *Id.* at 1258, n. 3. The Tenth Circuit agreed. It held that although the challenged law was amended to correct its alleged constitutional flaw and plaintiff suffered no compensable injury, an award of nominal damages required the court to determine whether a no-longer-

operative law comported with the First Amendment. *Id.*[4]

Utah Animal Rights Coalition inspired three separate opinions, induced a plea for this Court's intervention;[5] and incited other courts to break from the majority rule.[6]

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[4]The question of whether nominal damages prevents mootness occurs in other contexts and other circuits — the majority reaching the same conclusion — the plea for nominal damages avoids mootness in the face of a change of governmental policy. For example, the Third Circuit in a prisoner discipline case reasoned that case was not moot despite cessation of alleged unconstitutional conduct because plaintiff sought an award of nominal damages. *Burns v. PA Dept. of Correction*,544 F.3d 279, 284 (3d Cir. 2008). Likewise the Fourth Circuit held that a billboard company's suit was not moot although the city revised its unconstitutional regulation prior to judgment because plaintiff was entitled to at least nominal damages if it prevailed on its claim. *Covenant Media of SC, LLC v. City of North Charleston*, 493 F.3d 421, 429, n.4 (4th Cir. 2007). *See also Advantage Media, LLC v. City of Eden Prairie*, 456 F.3d 793, 803 (8th Cir.2006) (holding that a city's revisions of its sign ordinance did not moot a sign company's claim because the company made a claim for nominal damages which it would be entitled to collect if it prevailed on its first amendment claim).

[5] *See Utah Animal Rights Coalition*, 371 F.3d at 1258 (McConnell, J. concurring) (urging this Court to decide if a prayer for nominal damages saves an otherwise nonjusticiable from becoming moot).

[6] *See Morrison*, 521 F.3d at 611 (citing to *Utah Animal Rights Coalition* as a basis for holding that nominal damages awarded based upon a policy no longer in existence did not prevent dismissal because of mootness); *Freedom From Religion Foundation, Inc.*, 581 F.Supp.2d at 1031-1032 (relying on *Utah Animal Rights Coalition* as justification for dismissing

B. Until the issue is resolved, parties (in circuits that have wrongly decided the issue) are being forced unjustly to bear risks and costs of litigation that they should not.

The arguments for each side of the issue are simple but irreconcilable.

The argument for invoking the mootness doctrine to dismiss a case where the government has repealed or replaced the challenged law is that nominal damages are the functional equivalent of declaratory relief. "Where ... the challenged past conduct did not give rise to a compensable injury and there is no realistic possibility of a recurrence, nominal damages have no more legal effect than would injunctive or declaratory relief in the same case." *Utah Animal Rights,* 371 F.3d at 1268 (McConnell, J., concurring). *See also, Morrison*, 521 F.3d at 611 (holding that nominal damages awarded based on a policy no longer in existence was an insufficient basis for jurisdiction because such an award would have no effect on the parties' legal rights). This was exactly the reasoning the Second Circuit employed in this case — "we cannot issue a decision that would confer any relief to the plaintiffs and therefore lack jurisdiction." A. at 4a.

The argument against invoking the mootness doctrine to dismiss a case where during the litigation the government has repealed or replaced the challenged law is that nominal damages are

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a case for lack of standing where government changed its policy and plaintiff's only claim was for nominal damages).

awarded to redress a real past harm suffered where no quantifiable damages can be proved. The logic is simple: plaintiff's constitutional rights were truly harmed by defendant, defendant should have to pay for the harm even when damages are not measurable. The violations of constitutional rights are not valueless, it is that the value cannot be measured[7] — "By making the deprivation of [constitutional] rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury...." *Carey*, 435 U.S. at 266.

The Courts of Appeals have disagreed over which reasoning is proper and therefore which rule of law is correct. This division poses serious consequences for both §1983 plaintiffs and governmental defendants. On the one hand if a change or repeal of an unconstitutional policy suffices to moot a case despite a plea for nominal damages, then in the majority of circuits, governments are wrongly being forced to bear the plaintiffs' costs and attorney fees.

On the other hand, in the minority of circuits, if the award of nominal damages does not avoid mootness, plaintiffs are being barred from vindicating constitutional rights that have truly been infringed because defendants may dodge both

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[7] *Memphis Community School Dist.*, 477 U.S. at 310 (noting that "history and tradition do not afford any sound guidance concerning the precise value that juries should place on constitutional protections").

judgment and costs and fees by eleventh hour evasive maneuvers.

Moreover, the minority regime may encourage unconstitutional conduct — that is to say, the more a law crosses the constitutional boundary, the more likely the government is to change the law if sued, which makes it less likely that a plaintiff would challenge the law because they will not be able to obtain a firm final judgment or recover the expense of suing. Meanwhile, the government gets to "test the waters" all the way through the trial court and even through argument on appeal, at which point if things look worrisome, the government can suddenly repeal the challenged policy and walk away unscathed.[8]

Only one side of the split can be right — either such cases as petitioners should be dismissed as moot letting defendants off the hook or plaintiffs, like petitioners, should prevail and be awarded their fees and costs. Until the issue is resolved, parties (in circuits that have wrongly decided the issue) are being forced unjustly to bear risks and costs of litigation that they should not. Petitioners request, therefore, that the Court grant their petition to resolve the divergent application of the mootness

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[8] *See e.g., Beta Upsilon Chi Upsilon Chapter at the University of Florida v. Machen*, 586 F.3d 908, 914 -915 (11th Cir. 2009) (involving a case where an appellate court granted plaintiff injunctive relief pending appeal against university in a first amendment challenge to a discriminatory university policy, *after* oral arguments, to avoid defeat, the university announced to the circuit court that they had modified their policy; thereafter, the circuit ordered the entire case dismissed as moot).

doctrine and to set a uniform interpretation of the laws of the United States.

C. The minority side of the circuit split has a particularly pernicious effect upon free speech cases like this one where the government possesses unbridled discretion to determine access to a forum.

The minority side of the split has a particularly pernicious effect in unbridled discretion cases like this one. The central vice of unbridled discretion is that the government can hide unconstitutional viewpoint discrimination in surreptitious ways that are difficult to detect. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130-131 (1992); *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002). "[T]he use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the [government] is permitting favorable, and suppressing unfavorable, expression." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758 (1988). When viewpoint discrimination can be easily disguised, it follows that viewpoint discrimination is hard to prove. *Id.* at 758-59.

Therefore, without the ability to prove actual viewpoint discrimination in a particular instance in unbridled discretion cases, plaintiffs, like petitioners here, are left to mount facial challenges. No damages, except nominal ones, typically flow from a facial challenge. Consequently, such plaintiffs are particularly vulnerable to having cases mooted by changes in the policy made during the course of

litigation. As a result, government regulators have little to lose in adopting a scheme that permits unbridled discretion in determining access to a forum.

Circuits like the Sixth and Second essentially allow governmental officials to use the judicial system to gauge the lawfulness of policy, and then at the last second moot the challenge by amending the offending policies. If petitioners' case arose in either the Third, Fourth, Fifth, Eighth, Ninth, or Tenth Circuits, they would have had the opportunity to obtain a judgment for actually suffering under a facially unconstitutional policy. The right to have a case adjudicated should not depend on a geographical accident. Petitioners, therefore, request the Court to grant their petition.

D. In the decade since this Court's decision in *Buckhannon* the question whether nominal damages prevent a case from becoming moot, where the government has changed or repealed an alleged unconstitutional policy, has come strikingly to the fore.

Over the last decade, cases involving the question of whether nominal damages prevent the invocation of the mootness doctrine have come strikingly to the fore. The rash of these types of cases and the concomitant circuit split may be a by-product of *Buckhannon Bd. and Care Home, Inc. v. West*

Virginia Dept. of Health and Human Resources, 532 U.S. 598, 606 (2001).[9]

Generally pre-*Buckhannon*, § 1983 plaintiffs would file a complaint seeking declaratory and injunctive relief from an unconstitutional law. A change or a repeal to the challenged law that was triggered by the suit would allow § 1983 plaintiffs to be considered a prevailing party under a "catalyst" theory and permit them to recover their attorney fees and costs. *Id.* at 601-02.

Buckhannon rejected the catalyst theory and ushered in a new era — one in which § 1983 plaintiffs, in addition to seeking equitable relief (which would become moot if the governmental defendants repealed or replaced the policy), have had an incentive to also seek nominal damages in order to ensure government accountability for unconstitutional action. The Court foreshowed as much by noting that "[any] fear of mischievous defendants [who would moot a claim by a belated change in policy] only materializes in claims for equitable relief, for so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case." *Id.* at 608-09.

The catalyst theory is not at issue here. Rather the elimination of that theory, for better or worse, has caused a change in behavior of § 1983 plaintiffs.

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[9] *See supra* nn 2-3 (collecting cases that have dealt with whether nominal damages prevents mootness where the government has repealed or replaced the challenged law all of which occurred subsequent to this Court's decision in *Buckhannon*).

It is this change of behavior in response to *Buckhannon* that have forced courts to deal with the issue of whether nominal damages prevent mootness in the face of changed policy. The issue has spawned a deep circuit split and petitioners urge the Court to grant their petition to resolve it.

CONCLUSION

The issue of whether nominal damages prevents mootness in the face of changed policy has occurred in a variety of settings. Whether inside of prisons (*Burns v. PA Dept. of Correction*, 544 F.3d 279, 284 (3rd Cir. 2008)), at universities (*College Standard Magazine v. Student Association of the State of University of New York at Albany*, 610 F.3d 33 (2nd Cir. 2010)), on street corners (*Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1258 (10th Cir. 2004)), upon a billboard (*Covenant Media Of SC, LLC v. City of North Charleston*, 493 F.3d 421, 429, n. 4 (4th Cir. 2007)), or during high school (*Morgan v. Plano Independent School Dist.*, 589 F.3d 740, 748-749 (5th Cir. 2009)), the government tries to moot cases they are likely to lose and § 1983 plaintiffs fight to keep claims alive by seeking nominal damages. The lower courts have divided over the resolution of this issue and created a circuit split. Therefore, petitioners respectfully urge this Court to grant certiorari.

Respectfully submitted,

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